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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 798

CITY OF INDIANAPOLIS, A MUNICIPAL CORPORATION, PETITIONER

v.

DAN H. WHEELER, ACTING DIRECTOR, BITUMINOUS COAL DIVISION, UNITED STATES DEPARTMENT OF THE INTERIOR, AND BITUMINOUS COAL PRODUCERS BOARD FOR DISTRICT NO. 8, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT DAN H. WHEELER IN OPPOSITION

OPINIONS BELOW

The report of the examiner and the memorandum opinion of the Acting Director of the Bituminous Coal Division, adopting the examiner's report with modifications, are set forth in the record (R. 291–305, 359–366). The opinion of the Circuit Court of Appeals (R. 396–399) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 400) was entered on January 29, 1943. The petition for writ of certiorari was filed on March 8. 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the court below properly affirmed an order of the Acting Director of the Bituminous Coal Division dismissing an application filed by petitioner for exemption from the Bituminous Coal Code of coal consumed by it which it purchases from Milburn By-Products Coal Company, a West Virginia mining corporation whose capital stock is wholly owned by petitioner.

STATUTE INVOLVED

The pertinent provisions of the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72, 15 U. S. C., sec. 828 et seq., are set forth in Appendix A to the petition.

STATEMENT

On May 7, 1940, petitioner, a municipal corporation of the State of Indiana, filed an application with the Bituminous Coal Division, United States Department of the Interior, pursuant to the provisions of Sections 4 II (1) and 4–A of the Bituminous Coal Act of 1937 (R. 7). The application

alleged that the City of Indianapolis, through its Department of Utilities and under the registered trade name, Citizens Gas & Coke Utility, is engaged in the manufacture, sale, and distribution of artificial gas to consumers in Indianapolis. It purchases, it was alleged, substantial quantities of bituminous coal from Milburn By-Products Coal Company, a West Virginia corporation which owns and operates a mine at Milburn, Fayette County, West Virginia in District No. 8. Petitioner, the application recited, owns all of the outstanding capital stock of Milburn. The application prayed that petitioner "be granted an exemption respecting the coal which it produces from its mine and which it consumes"; it was admitted that coal produced by Milburn and sold to other customers is subject to the provisions of the Act (R. 8, 9).

Bituminous Coal Producers Board for District No. 8, a respondent herein, was permitted to intervene in the proceedings (R. 28), in opposition to the application. After due notice to interested parties (R. 24), a hearing was held June 24, 1940, before a duly appointed examiner of the Division. Petitioner appeared, introduced evidence, and made a full presentation of its position (R. 37–245). On September 20, 1941, the examiner submitted his report, in which he recommended denial of the application (R. 291–305).

Milburn filed exceptions to the report (R. 308–

317) and requested oral argument thereon (R. 319). The request was granted (R. 319), and oral argument was held before Howard A. Gray, Director of the Division (R. 321–340). On December 29, 1941, the issues were reargued before respondent Wheeler, then Acting Director of the Division (R. 342–359).[1] Thereafter, on April 7, 1942, respondent Wheeler, in a memorandum opinion, adopted, with some modification, the findings of fact and conclusions of law of the examiner, and entered an order dismissing the application for exemption (R. 359–366). He concluded that petitioner had not shown that it is the producer of the coal it consumes within the meaning of Section 4 II (1) of the Act. The Circuit Court of Appeals affirmed the order (R. 396–400). The following facts appear from the administrative findings and the undisputed evidence adduced at the hearing:

Petitioner, through its Department of Utilities and under the trade name of Citizens Gas & Coke Utility, is engaged in the manufacture, sale, and distribution of byproduct coke and artificial gas (R. 292). Petitioner purchases its high volatile bituminous coal requirements from Milburn By-Products Coal Company, a West Virginia corporation, which owns and operates the Milburn

[1] Respondent Dan H. Wheeler succeeded Howard A. Gray as Director of the Bituminous Coal Division on September 10, 1942.

Mine in Fayette County, West Virginia (R. 48). The principal office of Milburn By-Products Coal Company is located at Milburn, West Virginia (R. 294). Approximately 70 percent of the total output of the mine is sold to petitioner, the remaining 30 percent being sold through a sales agent in the general market (R. 294). Sales to petitioner are made at actual cost, the price varying with changes in total costs of producing the coal (R. 295). Petitioner acquires coal at average prices considerably less than those at which the balance of Milburn's output is sold on the market (R. 294). Because petitioner purchases the bulk of Milburn's output and thus guarantees the mine a high "running time," Milburn's costs of operation are reduced and it accordingly enjoys a "very advantageous" position with respect to the sales it makes in the open market (R. 102).

All of the capital stock of Milburn is owned by petitioner (R. 293). The seven members of the Board of Directors of Milburn, who serve it without compensation, also act as directors of petitioner's Department of Utilities (R. 49, 294). The actual operation of the mine is left to the general manager of Milburn, Andrew A. Gallagher, and a mine superintendent serving under his direction (R. 140). Gallagher, who is not connected with petitioner's Department of Utilities and who is not an employee of petitioner, enjoys virtual independence with respect to such matters

as the means and methods of extracting coal, purchasing materials and supplies, hiring and firing of employees, operating a supplies store and theatre, and renting company houses to employees (R. 301). He compiles reports of daily operations at the mine, and each month submits summary reports to the Board of Directors (R. 295–296). He serves under the general supervision of Thomas Kemp, who is assistant to the president of Milburn and general manager of petitioner's Citizens Gas & Coke Utility (R. 42, 52–53). Gallagher has no authority to make any capital investment without first submitting the matter to Kemp, and through him to the board of directors of Milburn (R. 79). Kemp confines his supervision to "general policy," such as the amount of tonnage which the mine is to produce (R. 79), and the amount and price of coal to be sold to petitioner and to others in the market (R. 97). Kemp, who visits the mine only at irregular intervals (R. 79), has never been employed by a coal-producing company to supervise mining operations, his experience having been in the gas industry (R. 133).

As a producer of bituminous coal, Milburn is a member of the Bituminous Coal Code (R. 93). Petitioner is not and has not been a member of the Code (R. 294), nor has it ever been admitted to do business in West Virginia (R. 265). Notwithstanding the identity of the directors of Mil-

burn and the Citizens Gas & Coke Utility, the corporate affairs of Milburn are handled separately at meetings of the directors (R. 72). Milburn has separate books of account which are kept at its mine in West Virginia by a bookkeeper whose salary it pays (R. 155–156). Milburn also maintains its own bank account in West Virginia, and checks thereon are drawn by its general manager, Gallagher (R. 51). The assistant secretary of Milburn serves as comptroller of the Citizens Gas & Coke Utility; he supervises the auditing of the Utility, which in turn audits the books of Milburn and directs its general accounting procedures (R. 148–149).

Milburn executes contracts in its own name, meets its pay roll, and pays federal, state, and local taxes and insurance premiums out of its own funds (R. 84–85). It files federal income-tax returns in its own name and is treated as an entity distinct from petitioner by the Commissioner of Internal Revenue (R. 33–36). All claims arising from accidents or injuries at the mines are handled and paid by Milburn (R. 94). Milburn owns leases covering the acreage from which it produces coal and pay royalties on the leaseholds from its own treasury (R. 81). As appears from its balance sheet, which is kept in its own name, it has more than $800,000 in assets, including general mine buildings and equipment and inventories of mine supplies (R. 257). In addition to

income which it receives from the sale of coal to petitioner and other purchasers, Milburn derives income from dwellings near the mine rented to employees, a store, theatre, and other investments which it has made in its own name (R. 83–84).

Petitioner appropriates no funds for the operation of Milburn; funds for the purchase of equipment and for other capital expenditures by Milburn come from its own treasury (R. 81). Milburn owes petitioner $50,000 on account of past loans; this debt is payable with interest (R. 157). Dividends declared by Milburn are paid to petitioner as owner of its stock (R. 56). The contract under which petitioner purchases coal from Milburn provides for the recovery of damages in the event that the coal supplied does not meet the required quality or cleanliness (R. 90). Milburn pays a "management fee" to petitioner which includes compensation for petitioner's auditing of Milburn's accounts. This fee is presently fixed at a sum equal to seven percent of the sales price of all coal sold by Milburn to customers other than petitioner (R. 232).

ARGUMENT

1. The primary question in this case is whether the City of Indianapolis and the Milburn Company are a single entity, within the meaning of the exemption in Section 4 II (1) of the Bituminous Coal Act for coal "consumed by the producer." Here the City consumed coal which

Milburn produced. Milburn is managed and operated as a separate corporation and sells only 70 percent of its output to the City. The control over Milburn exercised by the City is no different in extent than that normally exerted by a sole stockholder over the affairs of a corporation. The fact that the City is the sole stockholder and that its officers comprise the board of directors and officers of the Coal Company does not make this case so exceptional as to warrant disregard of the separate corporate existence of Milburn.[2]

Principles repeatedly approved by this and other courts, as well as the legislative history of the Coal Act itself, support the Director's finding that on such facts the City was not the producer

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[2] Fletcher, *Cyclopedia on Corporations*, § 43. In *Superior Coal Co.* v. *Department of Finance*, 377 Ill. 282, 289, 36 N. E. (2d) 354, the Supreme Court of Illinois, on facts very similar to these, declared: "As a general rule a corporation and its stockholders are deemed separate entities, * * *. Ownership of capital stock in one corporation by another does not, itself, create an identity of corporate interest between the two companies, nor render the stockholding company the owner of the property of the other, nor create the relation of principal and agent, representative, or *alter ego* between the two. (*United States* v. *Delaware, Lackawanna and Western Railroad Co.* 238 U. S. 516; *Pullman's Palace Car Co.* v. *Missouri Pacific Railway Co.* 115 id. 587; *Owl Fumigating Corp.* v. *California Cyanide Co.* 24 Fed. (2d) 718; *Richmond & Irvine Construction Co.* v. *Richmond, Nicholasville, Irving and Beattyville Railroad Co.* 68 Fed. 105.) Nor does the identity of officers of two corporations establish identity of the corporations. (*Owl Fumigating Corp.* v. *California Cyanide Co. supra.*)"

of the coal it consumed. The courts have frequently held that although a corporation will generally be treated as a separate legal entity, the corporate fiction will be disregarded when "used as a subterfuge to defeat public convenience, justify wrong, or perpetrate a fraud." *Commerce Trust Co.* v. *Woodbury,* 77 F. (2d) 478, 487 (C. C. A. 8); *Superior Coal Co.* v. *Department of Finance, supra.* But this does not mean that a person can establish a corporation in order to obtain the advantages of doing business through a separate entity, and then have the distinction between himself and the corporation ignored when such a course is advantageous to him. *Gray* v. *Powell,* 314 U. S. 402; *Higgins* v. *Smith,* 308 U. S. 473; *Taylor* v. *Standard Gas Co.,* 306 U. S. 307; *Superior Coal Co.* v. *Department of Finance, supra.* In *Gray* v. *Powell* this Court said that "The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan." (314 U. S., at 414.)

In addition, the history of the Coal Act shows definitely that Congress did not intend to include coal produced by an affiliated corporation within the exemption contained in Section 4 II (1).[3] That section was approved by the House in its present form. During debate in the Senate it was amended in order to exempt also coal produced

[3] The Circuit Court of Appeals for the Third Circuit has so held in *Keystone Mining Co.* v. *Gray,* 120 F. (2d) 1.

by corporations "owned by" or "under common ownership with a producer, provided such a producer does not sell any of his product on the commercial market."[4] This amendment (No. 44) was rejected in the conference report.[5] The rejection of the proposed amendment indicates that Congress did not intend Section 4 II (1) to exclude from the Act coal produced by one corporation for consumption by an affiliate.[6] *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 414 (1909); *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184 (1913); *Lapina* v. *Williams*, 232 U. S. 78, 89 (1914); *Carey* v. *Donohue*, 240 U. S. 430 (1916); *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96 (1935).

Petitioner argues that these principles do not apply to it because it operated its mine through

[4] 81 Cong. Rec. 3136.

[5] H. Rept. No. 578, 75th Cong., 1st Sess., pp. 1, 8. See *Gray* v. *Powell*, 314 U. S. at 410–411.

[6] It is also significant that the Bituminous Coal Conservation Act of 1935 (Sec. 19, 49 Stat. 991) defined "captive coal," for other purposes, as "all coal produced at a mine for consumption by the producer or *by a subsidiary* or *affiliate thereof* * * *." (Italics supplied.)

In the 1937 Act the only provision relating to "captive coal" is Section 4–II (1), which, to use the language of the 1935 Act, applies to "all coal produced at a mine for consumption by the producer" but omits the phrase "or by a subsidiary or affiliate thereof." The inference is clear that the exemption under Section 4–II (1) was not intended to be as broad as the definition of captive coal for other purposes in the 1935 Act.

a separate corporation not by choice but because under the laws of Indiana and West Virginia it could not legally do so otherwise. But this did not make the City's choice of a method of business involuntary; the City was not compelled to obtain its coal from the Milburn Mine or from a mine which it owned or controlled. Indeed, it is difficult to understand why the City's inability lawfully to operate the mine except through a separate corporation should be deemed an additional reason for disregarding the corporate entity.

For these reasons we think that the Director's decision that the City was not the producer of the coal it consumed within the meaning of 4–II (1) was not only both entirely reasonable and supported by substantial evidence, but correct as a matter of law. The *Keystone* case, decided by the Third Circuit, and the *Superior Coal Co.* decision of the Supreme Court of Illinois, both of which involved substantially identical facts, are squarely in accord.[7]

2. The opinion below, as petitioner states, seems to construe *Gray* v. *Powell* as giving a reviewing

[7] In *Consolidated Indiana Coal Co.* v. *National Bituminous Coal Commission*, 103 F. (2d) 124, the Seventh Circuit had taken a contrary view, which not only rejected the arguments advanced above but determined the question of exemption without giving any weight to the Commission's finding. That decision was subsequently dsapproved on the merits in both the *Keystone* and *Superior Coal Co.* cases and has been overruled by the Seventh Circuit in the case at bar.

court no authority to decide differently from the Director, once it finds that a fair hearing has been held. The Government made no such contention below, nor does it do so now. Its position, as expressed in its brief before the Circuit Court of Appeals, was and is that "the decision of the Supreme Court in *Gray* v. *Powell* requires that the Court affirm the order of the Acting Director * * * unless it clearly appears that the Acting Director has failed to apply the statute reasonably."[8]

Gray v. *Powell* states that a court's reviewing function under the Coal Act is performed when

[8] Brief for the respondent in the Circuit Court of Appeals, p. 13. The other statements in the Government's brief as to the scope of review were as follows:

"Under the ruling of the Supreme Court in *Gray* v. *Powell*, 314 U. S. 402 (1941), therefore, this Court is not free, upon consideration of this petition for review, to substitute its judgment for that of the Director even though there is virtually no dispute as to the evidentiary facts, but, on the contrary, it is its duty to affirm the order of the Director unless the set of circumstances upon which the Director's determination is based is so unrelated to the tasks entrusted by Congress to the Division as in effect to deny a sensible exercise of judgment" (pp. 21–22).

"* * * this Court should not, in the light of *Gray* v. *Powell*, 314 U. S. 402 (1941), balance the various delicate factors involved but should uphold the determination of the agency since it surely is not arbitrary and is supported by substantial evidence" (p. 33).

"* * * The Division's findings are conclusive if supported by substantial evidence" (p. 33).

"Unless the administrative determination is clearly unwarranted by the statute, arbitrary or not supported by substantial evidence, it is valid" (p. 34).

it determines "that there has been a fair hearing, * * * and an application of the statute in a just and reasoned manner" (314 U. S. 411), and that (p. 413) "it is the Court's duty to leave the Commission's judgment undisturbed" unless the Commission's decision "is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment." These statements were a reaffirmation of the settled doctrine, which has been expressed in various ways, that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (*Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287), and that an administrative determination will only be set aside if unsupported by substantial evidence or arbitrary and capricious (*Shields* v. *Utah & Idaho C. R. Co.,* 305 U. S. 177).[9]

For the reasons indicated *supra,* pages 8–12, the Director's decision in the instant case was clearly "just and reasoned," "sensible," "rational," and not arbitrary, capricious, or unsupported by substantial evidence. Indeed, we think affirmance would have been required irrespective of the scope of judicial review. Since the affirmance by the court below of the Director's decision was correct,

[9] See brief for the Government in *Gray* v. *Powell,* October Term, 1940, No. 603, pp. 23–24.

no further review would seem to be necessary. A judgment will not be disturbed because the court "relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran,* 302 U. S. 238, 245, and cases cited; *Securities and Exchange Commission* v. *Chenery Corp.,* October Term, 1942, No. 254, decided February 1, 1943, p. 6.

We do not conceive that the Seventh Circuit has been misled generally as to the scope of review of administrative action by *Gray* v. *Powell.* In many cases decided during the last year, that court has recognized the doctrine governing judicial review of administrative conduct.[10] Nor has it been unduly reluctant to set aside administrative decisions.[11]

[10] *United Biscuit Co.* v. *National Labor Relations Board,* 128 F. (2d) 771; *Quaker Oats Co.* v. *Federal Security Administrator,* 129 F. (2d) 76, reversed, No. 424, decided March 1, 1943; *National Labor Relations Board* v. *Martin Bros. Box Co.,* 130 F. (2d) 202, certiorari denied, No. 304, October 12, 1940; *National Labor Relations Board* v. *Acme-Evans Co.,* 130 F. (2d) 477, certiorari denied, No. 681, March 8, 1943; *Interlake Corp.* v. *National Labor Relations Board,* 131 F. (2d) 129; *National Labor Relations Board* v. *Bear Brand Hosiery Co.,* 131 F. (2d) 731; *Keller* v. *Federal Trade Commission* 132 F. (2d) 159; *Aronberg* v. *Federal Trade Commission,* 132 F. (2d) 165; *National Labor Relations Board* v. *Aintree Corp.,* 132 F. (2d) 469, certiorari denied, No. 702, March 15, 1943; *International Parts Corporation* v. *Federal Trade Commission,* No. 7998, decided February 17, 1943.

[11] See *Quaker Oats Company* v. *Federal Security Administrator* and *International Parts Corporation* v. *Federal Trade Commission, supra.* See, also, the dissenting opinion of Judge Major in *National Labor Relations Board* v. *Aintree Corp.,* 132 F. (2d), at 473.

CONCLUSION

The judgment below was correct and is in accord with the decisions of this and other courts. The petition for certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1942

No. 798

CITY OF INDIANAPOLIS, A Municipal Corporation,
Petitioner and Petitioner Below,

v.

DAN H. WHEELER, Acting Director Bituminous Coal Division of the Department of the Interior of the United States and District Board No. 8,
Respondents and Respondents Below

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT, BITUMINOUS COAL PRODUCERS BOARD FOR DISTRICT NO. 8 (DISTRICT BOARD NO. 8), IN OPPOSITION

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CITY OF INDIANAPOLIS, A Municipal Corporation,
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v.

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Respondents and Respondents Below

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RESPONDENT, BITUMINOUS COAL PRODUCERS BOARD FOR DISTRICT NO. 8 (DISTRICT BOARD NO. 8), IN OPPOSITION

OPINION

The opinion of the Circuit Court of Appeals (R. 396-399) is reported in 132 F (2d) 879 (Advance Sheets).

JURISDICTION

The opinion of the Circuit Court of Appeals was filed January 29, 1943 (R. 396). On February 4, 1943, the Court entered an order staying the issuance of the certified copy of the decree for ninety days from the date of the Court's

decision (R. 403). The petition for a writ of certiorari was filed March 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals was correct in its decision affirming an order of the Bituminous Coal Division of the Department of the Interior dismissing petitioner's application for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937.

STATUTE INVOLVED

The statute involved, Section 4, II (1) and Section 4-A of the Bituminous Coal Act of 1937, is set out in full in Appendix A to the petition, Pages 22-23.

STATEMENT

This proceeding was instituted by an application of the petitioner, City of Indianapolis, filed with the Bituminous Coal Division pursuant to the provisions of section 4-A of the Bituminous Coal Act of 1937 (15 U. S. C. A., Sec. 834, 50 Stat. 83). The application alleged that the coal produced by Milburn By-Products Coal Company (Milburn) for Citizens Gas & Coke Utility (the Utility) operated by the City of Indianapolis was exempt from the provisions of section 4 of the Act by virtue of the provisions of section 4, II (1) thereof (15 U. S. C. A., Sec. 833 (1) in that such coal was produced by Milburn, a wholly owned and controlled subsidiary of petitioner.

The respondent, Bituminous Coal Producers Board for District No. 8 (District Board), is the district board of code members of District 8 organized pursuant to the provisions of subsection (a) of part I of section 4 of the Bituminous Coal Act of 1937 (15 U. S. C. A., Sec. 832). The Milburn mine is located in District 8. Prior to the hearing of the matter before a trial examiner, the District Board filed

a petition for leave to intervene, which was granted (R. 26, 28).

Upon the recommendation of the trial examiner (R. 291) the Acting Director (now the Director) of the Bituminous Coal Division found that petitioner is not the producer of the coal produced by Milburn and, accordingly, dismissed the application for exemption (R. 359).

Thereafter, petitioner filed in the Circuit Court of Appeals for the Seventh Circuit a petition to review and set aside the order of the Acting Director (R. 369). On January 29, 1943, after argument in which the District Board participated, the Circuit Court of Appeals filed its opinion affirming the order under review.

The undisputed evidence before the trial examiner disclosed the following facts:

Milburn By-Products Coal Company, a West Virginia corporation, operates Milburn mine on Paint Creek in Fayette county, West Virginia (R. 48, 150). The principal office of the corporation is at Milburn, West Virginia (R. 68). About 70 per cent of the mine's production is used by Citizens Gas & Coke Utility, the balance being sold in the open market (R. 48). No exemption is claimed on the coal sold in the open market (R. 48). Citizens Gas & Coke Utility is the registered trade name for the executive department of the City of Indianapolis known as the Department of Utilities (R. 42). The stock of Milburn is held and voted by the board of directors of the Utility so that, as stockholders, the directors of the Utility elect the directors of Milburn (R. 70, 71). The directors and officers of the Utility and of Milburn are identical (R. 49). It appears that the directors are Indianapolis businessmen who serve for a nominal compensation, devoting only a part of their time to their duties as directors (R. 44, 45, 72, 73). Thomas L. Kemp, general manager of the Utility, serves as assistant to the president of Milburn and exercises general supervision over the coal-mining operations (R. 42, 50, 51, 55, 79).

Meetings of the board of directors of Milburn are called by its secretary and held at Indianapolis, no meetings being

held in West Virginia (R. 55, 71, 72). Minutes of these meetings, signed by Milburn's secretary, are kept at Indianapolis in the name of Milburn By-Products Coal Company (R. 55, 72). Such meetings are entirely separate and distinct from the meetings of the board of directors of the Utility; they are held after the meetings of the Utility's board of directors, separate minutes are kept, and none of the affairs of Milburn is taken up at the meetings of the directors of the Utility (R. 72).

The price of the coal taken by the Utility from Milburn is fixed by contract at the cost of mining (R. 49). This contract provides for the recovery of damages by the Utility in the event that the coal supplied or delivered is not of the quality or the cleanliness required (R. 90). To enable the Utility to determine the cost of coal, daily and monthly reports are received from Milburn showing the cost of production (R. 49). These reports are submitted by A. A. Gallagher, the general manager of the mine (R. 79). Gallagher is an employee of Milburn and does not appear on the payroll of the Utility (R. 78). Gallagher's duties are those of any general manager of a mining property, that is, he has charge of the general operation of the mine and the purchase of supplies and materials to carry on such operations (R. 78-79). He has no authority to make any capital investment without first submitting the matter to Kemp and through Kemp to the board of directors of Milburn (R. 78, 79). He has authority to hire and fire men, but his decisions in respect of the employment of the clerical force and foremen must be approved by Kemp (R. 86, 135). Kemp gives no orders as to the mechanics of the operation of the mine, but concerns himself with "general policy * * * as to the amount of tonnage that the mine is to produce", this amount being determined largely by the needs of the Utility (R. 79). Kemp also passes upon the price offered for the coals of Milburn under contracts for the sale of such coals on the open market (R. 96, 97). He visits the mine at irregular intervals: "I may visit it once every month or two, and I

may get down there only two or three times a year." (R. 79). He has never been employed by a coal-producing company to supervise mining operations, his experience having been in the gas industry (R. 132, 133, 42).

There are approximately three hundred and fifty men on the Milburn payroll. None of these men appears on the payroll of the Utility (R. 86-87).

The comptroller of the Utility is also assistant secretary of Milburn, although he receives no salary for his services in the latter capacity (R. 148-149). He supervises the auditing department of the Utility, which in turn audits the books of Milburn and directs Milburn's accounting procedure (R. 149). Separate books of account are kept by Milburn and the Utility, Milburn's accounting records being kept at the mine at Milburn, West Virginia. The records at the mine are in charge of a bookkeeper who is paid by Milburn (R. 55, 155-156). Milburn maintains its own bank account in West Virginia, and checks thereon are drawn by the general manager of Milburn (R. 51). Funds deposited in this account are derived from the sale of coal to the Utility and on the open market, from income received by Milburn from the operation of the mining village, company store and theatre which it maintains and from certain investments which Milburn has made in its own name (R. 83, 84, 85). No money whatever is appropriated by the City of Indianapolis or by the Utility for the operation of Milburn; all funds for the purchase of any equipment or for other capital expenditures by Milburn therefore come from Milburn's treasury (R. 81, 86). Milburn is paid once a month for the coal taken by the Utility (R. 51).

Milburn owes $50,000 to the Utility on account of past loans, and this amount is payable with interest (R. 85, 157). In addition, Milburn has a funded debt in its own name and has its own bonds outstanding (R. 85-86).

The Utility charges Milburn a fee for its services in connection with the management of Milburn (R. 112). The services performed for the management fee are the check-

ing of the records at Milburn by the Utility's auditors and the general supervision that is given to Milburn (R. 112-113, 116). This fee was originally a flat charge of $10,000 a year but is now fixed at a sum equal to 7 per cent of the sales price on all coal sold by Milburn as surplus coal (R. 113, 114, Applicant's Exhibit No. 22, R. 232). The management fee paid to the Utility is deducted as an operating expense by Milburn in making its income tax returns (R. 117).

The coal sold by Milburn on the open market, which approximates 30 per cent of its production, is disposed of through a sales agent and at a profit (R. 49, 73, 77, 87, 96-98). The invoicing of such coal and the payment therefor are handled in the same way as in the case of coal sold to the Utility (R. 95, 137-138). As a result of such sales on the open market, Milburn sometimes ends the year with earnings which are declared as dividends and paid over to the Utility (R. 49, 92). In respect of the coal sold on the market, Milburn enjoys a very advantageous competitive position, since the large tonnage taken by the Utility gives the mine a good running-time and thereby reduces costs (R. 102, 104).

The coal-producing lands are held by Milburn in its own name either in fee or under leaseholds. Royalties upon the leaseholds are paid by Milburn out of its own treasury (R. 80-81). Milburn executes all other contracts in its own name, meets the payroll for the miners and other employees, and pays the federal, state and local taxes and insurance premiums (R. 68, 84-87). All cases involving accidents or injuries at the mines are handled by Milburn and any valid claims resulting therefrom are paid by Milburn out of its own treasury (R. 93, 94). Milburn is a member of the Bituminous Coal Code (R. 92). Milburn is represented generally by the same firm of Indianapolis attorneys which represents the Utility although upon occasion Milburn has retained counsel in Charleston, West Virginia, and paid their fees out of its own treasury (R. 51-52, 94). The Utility is not a code member, nor has it ever made application to

be admitted to do business in West Virginia (R. 70, 92-93).

The coals purchased by the Utility from Milburn, which are high-volatile coals, constitute about sixty per cent of all the coal consumed by the Utility. The balance, consisting of low-volatile coals, is purchased from mines with which the Utility is not affiliated. From these various coals the Utility produces gas, which is sold to the citizens of Indianapolis at cost, and coke, which is sold at a profit (R. 98-102).

Mr. Kemp testified at the hearing that Milburn By-Products Coal Company is maintained as a corporate entity by the Utility "Because it is necessary so to do to comply with the laws of West Virginia." (R. 52.) It appeared that the City had been advised by West Virginia counsel that doubt existed "whether the public policy of this State would permit the operation of a coal mining property in the State by a foreign municipal corporation." (Applicant's Exhibit No. 13, R. 221, 222.)

ARGUMENT

The standard by which the findings and conclusions of the Acting Director must be judged was stated by this Court in *Gray* v. *Powell*, 314 U. S. 402, 413:

> The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.

It is submitted that the facts in this case demonstrate that the finding and conclusion of the Acting Director not only constitute "a sensible exercise of judgment" but were the only finding and conclusion possible. It follows that the dismissal of the request for exemption was proper and that the affirmance by the Circuit Court of Appeals was correct.

As the case was correctly decided below, there is involved no question requiring further review by this Court, that is, there is no special and important reason, within the meaning of Rule 38, 5 (b) of the Rules of this Court, for the granting of certiorari. Whether or not the Circuit Court of Appeals as contended by the petitioner "misconstrued and misapplied the decision of this Court in *Gray* v. *Powell*, 314 U. S. 402", is immaterial. "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U. S. 238, 245; *Securities and Exchange Commission* v. *Chenery Corporation*, — U. S. —, 87 L. ed. 411, 416 (Advance Opinions).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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